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IN THE

Supreme Court of the United States

October Term, 1970

No. 642

ALBERT MENGARELLI,

Petitioner,

v.

UNITED STATES OF AMERICA.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR REHEARING

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PETITION FOR REHEARING

Albert Mengarelli petitions the Court for a rehearing of the decision denying his petition for a writ of certiorari which was entered on November 23, 1970.

I

The petition for a writ of certiorari herein presented the question whether petitioner's employee could validly consent to the search and seizure of the contents of a box belonging to petitioner which was stored in the employee's home. This question, which involves a third party's abil-

ity to waive the fourth amendment rights of a criminal defendant by consenting to the search and seizure of the defendant's property, is closely analogous to the issues presented in *United States* v. *White*, No. 13, this Term, reargued October 20, 1970, which has not yet been decided by this Court.

United States v. *White*, *supra*, presents the question whether an informant can waive the fourth amendment rights of a criminal defendant by permitting government agents to overhear his conversation with the defendant by means of an electronic listening device. The Seventh Circuit's opinion in *White* clearly rejected the argument that a third party could waive the fourth amendment rights of a criminal defendant, stating:

> "* * * [the fourth] amendment's search and seizure protection is lost to a person when his actions as a matter of law can be said to constitute a waiver of his right. Since the fourth amendment protects a speaker's right to privacy, this right would be illusory if it could be waived by other individuals." 405 F2d 838 at 845.

The government's reliance on the informant's consent as validating the search and seizure in *White* was stressed by Assistant Attorney General Wilson in his argument before this Court. See 8 Cr. L. Rep. 4034.

It is apparent from the foregoing that this Court's decision in *White* will necessarily involve a ruling on the power of a third party to waive the fourth amendment rights of a criminal defendant. In view of the close analogy between the issues presented here and those in *White*,

petitioner respectfully submits that final disposition of this case should be held in abeyance pending a decision in *White*. If the Court affirms the decision of the Seventh Circuit in *White* that a third party cannot waive the fourth amendment rights of a criminal defendant, it would seem appropriate for the Court to summarily reverse the decision in this case. If, on the other hand, this Court rejects the Seventh Circuit's decision in *White* and rules that a third party can waive the fourth amendment rights of a criminal defendant by consenting to the overhearing of a conversation in which he is a participant, it may be appropriate for the Court to grant certiorari in this case to consider whether different standards should be applied in assessing the constitutional validity of a third party's consent to the search and seizure of physical objects which are the exclusive property of a criminal defendant.

Petitioner notes also that the question of a third party's consent to the search and seizure of a defendant's property is one which continues to arise and, thus, should be considered by this Court. See *State* v. *Flowers*, Mich. Ct. App. 8/28/70, 8 Cr. L. Rep. 2031 (8/28/70).

II

The petition for a writ of certiorari raised only questions relating to validity of the search and seizure. Further reflection suggests, however, that this case raises another substantial ground warranting consideration by this Court.

Petitioner, a person licensed to engage in the business of accepting wagers in the State of Nevada, was convicted

of conspiring to evade the 10% Federal excise tax on wagers. In *Grosso* v. *United States*, 390 U.S. 62, this Court held that a person who engaged in the business of accepting wagers in a state where that business was illegal could not be convicted for failing to pay the excise tax or for conspiring to evade the payment of that tax. See also *Marchetti* v. *United States*, 390 U.S. 39. The practical effect of the *Grosso* and *Marchetti* decisions is to make the federal law relating to the taxation of wagers inoperative in every state but Nevada, where petitioner carries on his business. This case thus raises the question whether, in light of *Grosso* and *Marchetti*, the enforcement of the wagering tax law in Nevada only violates the requirement of Article I, Section 8, of the Constitution that "all Duties, Imposts and Excises shall be uniform throughout the United States."

As this Court stated in *Fernandez* v. *Wiener*, 326 U.S. 340, 359:

> "It has long been settled that within the meaning of the uniformity requirement a 'tax is uniform when it operates with the same force and effect in every place where the subject of it is found.' "

See also *Patton* v. *Brady*, 184 U.S. 608; *Head Money Cases*, 112 U.S. 580.

While there can be no doubt that gambling may be found in every state,* the practical result of the *Grosso* and *Marchetti* decisions is that the gambling tax law will

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* The fact that gambling exists in every state distinguishes this case from those cases such as the *Head Money Cases*, 112 U.S. 580 which have held that Article I, Section 8 is not violated simply because the subject of the tax is not found in every state. See also *Poe* v. *Seaborn*, 282 U.S. 101.

be enforced only in Nevada. Thus, it appears that the decisions in *Grosso* and *Marchetti* have so restricted the enforcement of the gambling tax laws, that the application of these laws to a Nevada gambler, such as petitioner, would violate the uniformity requirements of Article I, Section 8 of the Constitution.

The above discussion suggests a further question concerning the continued validity on any portion of the gambling tax act in the light of *Grosso* and *Marchetti*. Those decisions have limited the application of that act to an extent that Congress could never have anticipated. Whereas Congress enacted a statute imposing a tax that was to be collected in every state, the *Grosso* and *Marchetti* decisions have made enforcement of that statute possible in only one state. Thus the question is presented whether the statute as a whole should fall because of the substantial frustration of the original Congressional intent. See *The Employers Liability Cases*, 307 U.S. 463; *Williams* v. *Standard Oil*, 278 U.S. 235.

In light of the foregoing, petitioner respectfully requests the Court to vacate its order denying certiorari and to grant the petition.

Respectfully submitted,

JOHN S. MARTIN, JR.
Attorney for Petitioner

Certificate of Counsel

I hereby certify pursuant to Rule 58 of the Rules of this Court that the above petition for rehearing is submitted in good faith and not for delay and is restricted to the grounds set forth in paragraph 2 of said Rule.

/s/ JOHN S. MARTIN, JR.

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